

PUBLIC

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.

APR 2 2015

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

Received

APR 22 2015

**iHEARTMEDIA'S RESPONSE TO SOUNDEXCHANGE'S
UNTIMELY MOTIONS *IN LIMINE* AND TO STRIKE TESTIMONY** Copyright Royalty Board

Under the Judges' clearly established schedule, all pre-hearing motions, including motions *in limine*, were due on April 1 and would be fully briefed by April 17; objections to the admissibility of the proposed exhibits were due on April 20.¹ Consistent with those clear rules, participants filed numerous pre-hearing motions to strike or to exclude portions of other participants' pre-filed written direct or rebuttal statements on or before April 1. Indeed, SoundExchange itself filed *four* such motions on April 1.

Apparently unsatisfied with its timely pre-hearing motions, SoundExchange included in its April 20 submission not only the "objections to the admissibility of the proposed exhibits" expressly contemplated in the *April 9 Order* (at 2), but also *four* additional motions *in limine*, as well as motions to strike portions of the pre-filed written direct and/or rebuttal statements of *twenty-four* of the Services' witnesses. Nothing in the *December 10 Order* or the *April 9 Order* allowed those belated motions *in limine* or to strike portions of written direct or rebuttal

¹ See Order Extending Discovery Period and Revising Case Schedule at Ex. A, Docket No. 14-CRB-0001-WR (2016-20) (Dec. 10, 2014) ("*December 10 Order*"); Order Regarding Hearing and Prehearing Schedule at 2 & Ex. A, Docket No. 14-CRB-0001-WR (2016-20) (Apr. 9, 2015) ("*April 9 Order*").

statements that had been filed months before. SoundExchange has thus again “made [a] tactical decision to make [a] late filing and then ‘beg forgiveness.’”² Moreover, SoundExchange forced the Services to devote time in the last week before the hearing to respond to these untimely motions so that the Judges would have the benefit of written submissions from both sides in advance of the hearing.³

For these reasons, the Judges should disregard SoundExchange’s untimely filed motions *in limine* and to strike testimony. If the Judges nonetheless consider the merits of SoundExchange’s motions *in limine*, it should reject them for the reasons set forth below. If the Judges permit SoundExchange to move to strike the indicated portions of the pre-filed testimony, we request the ability to address those motions when its witnesses testify.⁴ We also should have the opportunity to seek to strike portions of SoundExchange’s witnesses’ pre-filed testimony when those witnesses take the stand at the hearing, rather than through the guise of “exhibit objections.”

² Order Denying Licensee Services’ Motion To Strike SoundExchange’s “Corrected” Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld and Granting Other Relief at 7 n.7, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) (“*Rubinfeld Order*”).

³ SoundExchange also provided no advance notice to the Services of its decision to remove some 400 exhibits — about 20 percent of the more than 2000 exhibits it included on its initial list — before filing its amended exhibit list late on Monday afternoon. As a result, while SoundExchange was preparing its additional, untimely motions *in limine* and to strike, the Services were forced to waste their time considering and formulating potential objections to hundreds of exhibits that SoundExchange had already decided to withdraw.

⁴ For example, SoundExchange asserts without meaningful elaboration that numerous portions of witnesses’ pre-filed written direct and rebuttal testimony should be struck because that witness lacks sufficient expertise or a sufficient foundation to offer the pre-filed testimony. The Judges would benefit from first hearing from those witnesses before considering these claims.

ARGUMENT

A. Direct Agreements Between Individual Licensors and Licensees that Rely on or Incorporate the Pureplay Rates Are Admissible

Congress gave SoundExchange a time-limited right to enter settlement agreements with webcasters. *See* 17 U.S.C. § 114(f)(5)(A), (F) (settlement authority expires 30 days after enactment of the Webcaster Settlement Act of 2009). Congress deemed such agreements with SoundExchange to be “a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller.” *Id.* § 114(f)(5)(C). That is why Congress prohibited those settlement agreements, or the provisions of the agreements, from being admitted as evidence or taken into account at a hearing to set the statutory rate. *See id.* Indeed, the Register of Copyrights recognized as much when the Pureplay agreement was published in the Federal Register, explaining that the “the rates and terms set forth in the agreement . . . have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords.”⁵

No participant is seeking to introduce the Pureplay agreement — or any of its terms — *for the purpose* of setting rates in this proceeding. Instead, iHeartMedia and the other Services are relying on agreements entered into directly with license holders — not with SoundExchange — long after the statutory settlement period had expired, and in which the parties *voluntarily agreed* to terms that include, among many other terms, [REDACTED]

[REDACTED]. Unlike settlements that SoundExchange entered into under

⁵ Copyright Office, Notification of Agreements under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34796, 34796 (July 17, 2009).

§ 114(f)(5), these direct agreements were negotiated in the marketplace, with record labels, albeit under the shadow of the statutory license. Those agreements are precisely the kind of agreement that the Judges have recognized are most persuasive in determining the rate a willing buyer would pay and a willing seller would accept.⁶ Nothing in § 114(f)(5) precludes the Judges from considering and relying on these marketplace agreements as relevant benchmarks.

Nor is there any merit to SoundExchange's assertion (at 3) that § 114(f)(5) hampers its ability on cross-examination to introduce evidence showing that these direct agreements incorporate [REDACTED]. The statute precludes the Judges from relying on the Pureplay agreement for purposes of setting the statutory rates and terms. But when SoundExchange asks such questions, § 114(f)(5) is no barrier, because it is not trying to use the Pureplay agreement for the statutorily prohibited purpose. Indeed, as SoundExchange explains (at 3), it would be asking those questions to try to "demonstrate the heavy shadow" the Pureplay agreement casts. We agree that any "shadow" cast by the Pureplay agreement must be removed from those rates, and it is *consistent with* § 114(f)(5) to remove that shadow, so that the Pureplay agreement is not used to set the statutory rate.

In all events, Congress did not categorically bar the consideration in rate proceedings of § 114(f)(5) settlements. Where SoundExchange and "a webcaster that is party to" a § 114(f)(5) settlement agreement "expressly authorize the submission of the agreement," the Judges may consider it. *Id.* § 114(f)(5)(C). Therefore, SoundExchange has the power to seek to lift any bar § 114(5)(C) imposes on its cross-examination. Yet SoundExchange makes no claim that it has

⁶ See Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters at 3, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 3, 2014) (noting the "important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates").

asked any webcaster that is a party to the Pureplay agreement to agree to the submission of that agreement here, or that any webcaster refused such a request.

B. iHeartMedia May Present Testimony from Both Professor Fischel and Professor Lichtman

iHeartMedia presented joint pre-filed written direct and rebuttal testimony from Professor Daniel Fischel and Professor Douglas Lichtman, which clearly identify who had primary responsibility for the various portions of the joint testimony. *See* Fischel/Lichtman WDT at 8 n.12; Fischel/Lichtman WRT at 4 n.12. SoundExchange's rebuttal witnesses had no difficulty understanding which of iHeartMedia's witnesses was primarily responsible for which testimony. *See, e.g.,* Lys WRT at 44 n.170 (recognizing that "Professor Fischel was primarily responsible for th[e] EVA analysis"). SoundExchange separately deposed Professor Fischel and Professor Lichtman, and makes no claim that it was unable to determine which topics to pursue with each witness. There is simply no basis to prevent iHeartMedia from allowing each to present testimony about the matters for which he was primarily responsible.

Although SoundExchange asserts (at 4) that allowing both to testify would be cumulative, it has no basis for its assertion that Professor Fischel and Professor Lichtman "agree that they are completely interchangeable." Neither said any such thing. On the contrary, Professor Lichtman made clear that, when "doing a detailed calculation or getting ready to do depositions," each "focused [on the] primary sections" identified in their pre-filed statements. Lichtman Dep. Tr. at 8:3-17 (attached to SX Obj. at Ex. 1). In all events, iHeartMedia has every incentive to ensure that its presentation of the evidence makes efficient use of the limited hearing time and that both Professor Fischel and Professor Lichtman present distinct, non-cumulative testimony regarding the specific topics as to which each had primary responsibility.

SoundExchange provides no basis for the Judges to presume, ahead of time, that one should be excluded as cumulative.

C. iHeartMedia Presented Proper Rebuttal Testimony

SoundExchange identifies certain aspects of the written rebuttal testimony of Professor Fischel and Professor Lichtman that it claims constitute improper rebuttal testimony. None of the claims has merit. The Judges have explained that, while there is no “‘bright line’ test,” rebuttal testimony “has the appropriate ‘nexus’” to direct testimony when it “add[s] new facts and opinions that (a) show a ‘nexus’ between the particular subject in question and a purported ‘shortcoming’ in the approach taken by [the other side’s] witness, but also (b) bolster[s] the prior WDT” of that witness. *Rubinfeld Order* at 6-7. Here, the testimony SoundExchange singles out easily satisfies that standard.

- Fischel/Lichtman WRT ¶¶ 16-20 & Exs. A-D: These paragraphs and exhibits expressly respond to “Professor Rubinfeld[’s] claim[.]” that “consumers view interactive and non-interactive services as functionally convergent,” by showing a “recent ‘natural experiment’” — based on Pandora’s institution and removal of a cap on its ad-supported service — that “demonstrates that consumers do not treat non-interactive and interactive services as if they are close substitutes.” Fischel/Lichtman WRT ¶¶ 15-16.
- Fischel/Lichtman WRT ¶ 27: This paragraph identifies a shortcoming in Professor Rubinfeld’s approach, namely his failure to account for artists’ “interest[.] in webcasting as a form of promotion” for “touring, shows, and live performances,” which “constitute the single largest source of income [for artists] on average.”
- Fischel/Lichtman WRT ¶¶ 78-81: These paragraphs identify, as a “key reason why Professor Rubinfeld failed to account for many important differences between interactive and non-interactive services,” that those differences “are extremely difficult to model,” and sets forth an alternative method — the “prices paid by interactive and non-interactive services for other necessary inputs” — that “can potentially account for all of the important differences between interactive and non-interactive services” that Professor Rubinfeld ignored, without the need to model them precisely.

- Fischel/Lichtman WRT ¶¶ 7, 117-121: These paragraphs identify shortcomings in SoundExchange's proposed interest rate, while also bolstering iHeartMedia's proposed rate.
- Fischel/Lichtman WRT ¶¶ 5, 110-116: These paragraphs expressly address a "fourth issue" in "Professor Rubinfeld's testimony" — his "assertion that the statutory rate should increase by a specified amount during the 2016 – 2020 term."⁷

For these reasons, all of this testimony and evidence meets the test the Judges have set forth for rebuttal testimony and was properly included in the pre-filed written rebuttal statements.

D. The Record Companies Are the Real Parties in Interest and Their Statements Are Admissible Under Rule 801(d)(2)

SoundExchange exists to collect statutory royalties on behalf of the record labels and artists. Representatives of the three major labels — Sony, Universal, and Warner — and other record labels sit on its Board. SoundExchange is sponsoring written direct and rebuttal testimony from record label executives in support of the rate proposal that would directly result in higher per-performance payments to those labels. And the Judges granted an iHeartMedia motion to compel and ordered SoundExchange to search for and produce documents in the files of the record labels themselves — "not only the record companies whose witnesses have provided a WDT in this proceeding on behalf of SoundExchange, but also any corporation, division, or other business unit operating as a record label within the corporate organization of those record companies."⁸ There can be no question that the record labels are among the real parties in interest here.

Yet SoundExchange now seeks (at 6-7) to prevent iHeartMedia and the other Services from *using* the record label documents that have been produced in discovery, asserting that those documents are hearsay and cannot be admitted under Rule 801(d)(2) as statements by a party

⁷ SoundExchange's objections to paragraphs 5, 7, and 110-116 of the Fischel/Lichtman WRT appear only in SoundExchange's objection chart.

⁸ Discovery Order 1 at 8 n.12, Docket No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015).

opponent. In so doing, SoundExchange seeks to present a wholly one-sided story from the record labels without fear of contradiction. SoundExchange can select the record label executives it wishes to present as witnesses at the hearing — and those it has selected are notably *not* those most directly involved in negotiations with statutory services or the promotion of artists' works — while excluding the admission of evidence from the files of those same labels that contradicts SoundExchange's story simply because other employees from those labels authored the documents and have not been offered by SoundExchange as witnesses. This approach not only seeks to deny the Services the ability to conduct full cross-examination of SoundExchange's witnesses, but also deprives the Judges of a full and accurate picture of the facts and circumstances surrounding important agreements and issues in contention.

In all events, SoundExchange is simply wrong on the law. Courts applying Rule 801(d)(2) “have recognized the established principle that admissions by *the beneficial party or real party in interest* . . . are admissible in evidence against the nominal plaintiff representing his interests.” *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985) (emphasis added; internal quotation marks omitted; omission in original); *see also In re TOUSA, Inc.*, 444 B.R. 613, 665 n.53 (S.D. Fla. 2011) (reversing exclusion of evidence and finding non-hearsay under Rule 801(d)(2) “statements by an agent or officer of the Conveying Subsidiaries who were the real parties to the avoidance action”), *aff'd in part, rev'd in part on other grounds*, 680 F.3d 1298 (11th Cir. 2012); *see U.S. ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868, 880 (D. Md. 1995) (statements of United States in a *qui tam* case in which the federal government had not intervened as a party are admissible under Rule 801(d)(2) because “the United States is the real party in interest”); *cf. United States v. Ballou*, No. CR 14-2579 JB, 2014 WL 6065639,

at *31 (D.N.M. Oct. 16, 2014) (explaining that, in applying Rule 801(d)(2), the court “looks at who the real party is” and not the “formal party on case captions”).

The record labels are among the real parties in interest here. Indeed, the labels are able to avoid being participants in this proceeding only because SoundExchange is appearing as a participant here *on their behalf*. Therefore, the record labels’ statements are admissible against SoundExchange under Rule 801(d)(2).⁹

Finally, even if these documents were hearsay statements not within any exception to the hearsay rule — and they are not — the Judges should still admit them. As SoundExchange itself acknowledges (at 5), the Judges have the discretion to admit hearsay “to the extent deemed appropriate.” 37 C.F.R. § 351.10(a). SoundExchange offers nothing but the most conclusory assertions as to why it allegedly would be inappropriate for the Judges here to consider highly relevant statements from employees and in the files of the record labels — including, in particular, the record labels that are actually providing SoundExchange with witnesses who will testify during the proceeding. Once admitted, the Judges can determine the appropriate weight to give those statements and exhibits given the full context surrounding them.

CONCLUSION

For the foregoing reasons, the Judges should disregard SoundExchange’s belatedly filed motions. In the alternative, the Judges should deny the motions *in limine* and reserve judgment on the motions to strike witness testimony.

⁹ Even if they were not admissible under Rule 802(d)(2), record label documents can also be admissible under other exceptions to the hearsay rule, including as business records under Rule 803(6) or as statements against interest under Rule 804(b)(3). SoundExchange’s decision to present only a limited selection of record label executives as witnesses renders the others unavailable for purposes of Rule 804(a).

Dated: April 22, 2015

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CERTIFICATE OF SERVICE

I, Evan T. Leo, hereby certify that a copy of the foregoing PUBLIC version of iHeartMedia's Opposition and Response to SoundExchange's Untimely Motions *in Limine* and To Strike Testimony has been served on this 22nd day of April 2015 on the following persons:

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Declaration of
Evan T. Leo



Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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In the Matter of

DETERMINATION OF ROYALTY RATES)	Docket No. 14-CRB-0001-WR
FOR DIGITAL PERFORMANCE IN SOUND)	(2016-2020)
RECORDINGS AND EPHEMERAL)	
RECORDINGS (WEB IV))	

DECLARATION AND CERTIFICATION OF EVAN T. LEO
ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. (“iHeartMedia”) in this proceeding, and I submit this Declaration in support of the restricted version of iHeartMedia’s Opposition and Response to SoundExchange’s Untimely Motions *in Limine* and To Strike Testimony.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked “RESTRICTED” to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines “confidential” information that may be labeled as “RESTRICTED” as “information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future.” *Id.* The Protective Order further requires that any party producing such confidential information must “deliver with all Restricted materials an affidavit or declaration . . . listing a description of all materials marked with the ‘Restricted’ stamp and the basis for the designation.” *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated “RESTRICTED” and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to information designated RESTRICTED by other participants in this proceeding. iHeartMedia has designated such information as RESTRICTED to maintain its confidentiality in accordance with the Protective Order’s command to “guard and maintain the confidentiality of all Restricted materials.” Protective Order at 2.

5. The confidential information comprises or relates to (1) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and often subject to express confidentiality provisions with third parties; (2) financial projections, financial data, and business strategy that are proprietary, not available to the public, and commercially sensitive; and (3) material subject to third-party licenses or other limitations that restrict public disclosure.

6. If the confidential information were to become public, it would place iHeartMedia at a commercial and competitive disadvantage; unfairly advantage other parties to the detriment of iHeartMedia; and jeopardize iHeartMedia’s business interests. Information related to iHeartMedia’s confidential contracts or iHeartMedia’s relationships with content providers could be used by iHeartMedia’s competitors, or by other content providers, to formulate rival bids, bid up iHeartMedia payments, or otherwise unfairly jeopardize iHeartMedia’s commercial and competitive interests.

7. With respect to the financial information, I understand that iHeartMedia has not disclosed to the public or the investment community the financial information that it seeks to restrict here, including its internal financial projections and specific royalty payment information. Consequently, neither iHeartMedia's competitors nor the investing public has been privy to that information, which iHeartMedia has treated as highly confidential and sensitive, and has guarded closely. In addition, when iHeartMedia does disclose information about its finances to the market as required by law, iHeartMedia provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that iHeartMedia seeks to restrict by designating it confidential is not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the materials include information that has not been approved by iHeartMedia's Board of Directors, as such sensitive disclosures usually are, and is not accompanied by the disclaimers that usually accompany such disclosures. iHeartMedia could experience negative market repercussions and competitive disadvantage were this confidential financial information released publicly without proper context or explanation.

8. The contractual, commercial and financial information described above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

April 22, 2014

Respectfully submitted,

/s/ Evan T. Leo

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RECORDINGS (WEB IV))

**REDACTION LOG FOR iHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S
UNTIMELY MOTION *IN LIMINE* AND TO STRIKE TESTIMONY**

iHeartMedia hereby submits the following list of redactions from the Opposition to SoundExchange's Untimely Motion *in Limine* and To Strike Testimony filed April 22, 2015, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of Evan T. Leo submitted herewith, that the listed redacted materials are properly designated confidential and "RESTRICTED."

Document	Page/Paragraph/ Line	General Description
Services' Joint Opposition to SoundExchange's Untimely Motion <i>in Limine</i> and To Strike Testimony	p. 3, para. 2, lines 5-6	Contains confidential information regarding the terms iHeartMedia's licensing agreements
	p. 4, para. 1, line 3	Contains confidential information regarding the terms iHeartMedia's licensing agreements

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